84-1651

Office-Supreme Court, U.S.
FILED
APR 12 1985
ALEXANDER L. STEVAS,
CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF FLORIDA,

Petitioner,

vs.

HENRY MARCY MANEE,

Appellant

PETITION FOR WRIT OF CERTIORARI FLORIDA SECOND DISTRICT COURT OF APPEAL

JIM SMITH
ATTORNEY GENERAL

DAVIS G. ANDERSON, JR.
FRANK J. MIGLIORE, JR.
Assistant Attorneys General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

32 pp

QUESTION PRESENTED FOR REVIEW

1. If a police officer has probable cause to believe there is contraband in a specific container in a vehicle and there is probable cause to search the entire vehicle, then, pursuant to the Fourth Amendment principles set forth in United States v. Ross, 456 U.S. 798 (1982), must he obtain a search warrant for the container holding the contraband.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITATIONS	iii
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
RELEVANT CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	11
CERTIFICATE OF SERVICE	12
APPENDIX	A1-16

TABLE OF CITATIONS

	PAGE
Arkansas v. Sanders, 442 U.S. 753 (1979)	7,9
Davis v. Alaska, 415 U.S. 308, 315 (1974)	9
Gideon v. Wainwright, 372 U.S. 335 (1963)	9
Malloy v. Hogan, 378 U.S. 1 (1964)	9
Oklahoma v. Castleberry, ___U.S.___ (Case No. 83-2126)	8
Oregon v. Mathiason, 429 U.S. 492, 493 (1977)	10
Pernell v. Southall Realty, 416 U.S. 363, 365 (1974)	9
United States v. Chadwick, 433 U.S. 1 (1977)	9
United States v. Ross, 456 U.S. 798 (1982)	7,9

OTHER AUTHORITIES

28 U.S.C. 1257(3)	1
U.S. Const. amend, IV §1	2
U.S. Const. amend, XIV	2

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINIONS BELOW

The opinion of the Florida District Court of Appeal, Second District appears at 457 So.2d 530 (Fla. 2 DCA 1984), cert. denied, __ So.2d __ (Fla. Case No. 66,210, Feb. 20, 1985) (Appendix A 1-16)

JURISDICTIONAL STATEMENT

Florida's Second District Court of Appeal entered its decision on September 21, 1984.

Florida Supreme Court declined to accept jurisdiction or to entertain any Motion for Rehearing on February 20, 1985.

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. 1257(3).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the

Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It is applicable to the states through the offices of the Fourteenth Amendment. It provides:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The State charged Respondent with possession of more than twenty grams of marijuana. The trial court denied his motion to suppress a warrantless search. He then pled nolo contendere, reserving the right to appeal the denial of his motion to suppress. (A 3)

Respondent took a direct appeal to Florida's Second District Court of Appeal. The Second District reversed his conviction. (A 16)

The State subsequently petitioned Florida Supreme Court to review the Second District's decision. However, Florida Supreme Court denied the State's Petition. (A 1)

Respondent worked for ABA Industries. The company's security officer advised the sheriff's office that Respondent was dealing in narcotics in the company parking

lot early in the morning and during the lunch hour. Detective Howard Reed ran a background check on Respondent and learned that he had been charged with possession of marijuana in the past. Detective Reed established a surveillance of the parking lot, beginning on June 14, 1983. He watched Respondent for two days and observed nothing suspicious. On both days, however, Respondent left the plant in his automobile for about a half hour during his lunch period. On June 16, 1983, at about noon, Detective Reed followed Respondent in his automobile to a building known a Martin Manufacturing. Approximately six minutes after Respondent went inside the building, an unidentified man came out briefly and looked up and down the street in what Reed described as a "suspicious manner." About six minutes

later, Respondent came out of the building carrying a paper bag, immediately followed by the same unidentified man. As Respondent left in his automobile, the man once again looked up and down the street before returning inside.

Detective Reed, an experienced narcotics officer, described the paper bag as being rolled down from the top onto the contents. The bag was rolled so tightly that Reed could distinguish the shape of the contents inside, that it was "something of a loose nature, because it had a round shape to it." He further explained that during his undercover work he had observed persons break up quantities of marijuana and package it for transportation using brown paper bags. Such persons "always seemed to carry" the bags in the manner of Respondent. Predicated upon

Respondent's actions and the appearance of the bag, Detective Reed believed that the bag contained marijuana.

When Respondent returned to ABA Industries, he left the bag in his automobile and went back to work. Detective Reed continued to maintain surveillance because he anticipated that a narcotics transaction was likely to ensue. However, nothing occurred. Respondent left work at 5:00 p.m., entered his car, and drove out of the parking lot. At this point, Detective Reed stopped the automobile and removed Respondent from the car. Detective Reed was unable to see the bag in plain view. Without obtaining Respondent's consent to search, Detective Reed entered the car and located the bag in a compartment. Upon opening the bag, he found a half pound of marijuana. (A 3-6).

Florida's Second District found that Detective Reed had probable cause to believe that the brown paper bag contained marijuana. (A 6-7).

However, it read United States v. Ross, 456 U.S. 798 (1982) to draw a distinction between a case where the police have probable cause to believe that contraband is located in a specific container within a vehicle and one in which they simply have probable cause to believe that a vehicle is transporting contraband. (A 14-15).

Subsequently, it attempted to reconcile its decision with Arkansas v. Sanders, 442 U.S. 753 (1979) on the ground that, as in Sanders, since the police had the container under surveillance before it reached the vehicle, the fact that later it was fortuitously placed in the vehicle before being seized does not authorize the application of the "automobile exception." (A 15).

REASONS FOR GRANTING THE WRIT

This petition presents the same important question which this Court currently entertains in Oklahoma v. Castleberry, __ U.S. __ (Case No. 83-2126):

> Whether, under the Fourth Amendment principles set forth in United States v. Ross, 456 U.S. 798 (1982), when an officer has probable cause to believe that there is contraband in a specific container in a vehicle, and probable cause exists to support a search of the entire vehicle, he is required to obtain a search warrant for the vehicle and the compartments and containers therein.

The opinion below turns on an interpretation of a substantial Fourth Amendment Search and Seizure question. Neither may the opinion below rest on any independent ground of state law.

The state court has decided a substantial and unsettled federal question arising under the Constitution. It has

rendered an erroneous, or at least doubtful decision on this question. This Court frequently grants a petition for a writ of certiorari, despite the absence of conflict, under such circumstances. See Pernell v. Southall Realty, 416 U.S. 363, 365 (1974); Davis v. Alaska, 415 U.S. 308, 315 (1974).

The State Court has relied upon three Supreme Court decisions, United States v. Ross, supra, Arkansas v. Sanders, supra and United States v. Chadwick, 433 U.S. 1 (1977) that are now ripe for clarification. See e.g., Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

This court should grant certiorari to determine whether the state court has properly interpreted, applied and extended Ross, Chadwick and Sanders on the facts

below. See, e.g., Oregon v. Mathiason, 429 U.S. 492, 493 (1977) (certiorari granted because state court "has read Miranda too broadly").

Carried to its extreme, the reasoning behind the decision below produces the anomaly that the police are at liberty to conduct a warrantless search of a vehicle which they have probable cause to believe is transporting contraband only so long as they do not know the exact container in which the contraband is located.

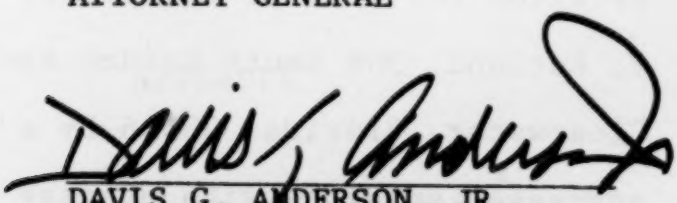
The decision below thus injects a great amount of uncertainty into what is otherwise a workable, straightforward rule regarding searches of automobiles.

CONCLUSION

Certiorari should be granted and the decision of the Florida Second District Court of Appeal reversed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



DAVIS G. ANDERSON, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I, DAVIS G. ANDERSON, Counsel for Petitioner, and a member of the Bar of the United States Supreme Court, hereby certify that on the 12th day of April, 1985, I served three copies of the Petition for Writ of Certiorari to David J. Kurland, 308 South Garden Avenue, Clearwater, Florida 33516 by a duly addressed envelope with postage prepaid.

Davis G. Anderson Jr.

DAVIS G. ANDERSON, JR.
Assistant Attorney General

APPENDIX

SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
	:	
Petitioner,	:	
	:	
	:	Case No. 66,210
vs.	:	Dist. Ct. of Appeal
	:	2d Dist. No. 84-277
	:	
HENRY MARCY MANEE.	:	
	:	
Respondent.	:	
	:	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. (9.330(d).

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

HENRY MARCY MANEE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee

Case No. 84-277

Opinion filed September 21, 1984.

Appeal from the Circuit

Court for Pinellas County;

Horace A. Andrews, Acting

Circuit Judge.

GRIMES, Judge.

Appellant was charged with possession of more than twenty grams of marijuana. His motion to suppress the warrantless search was denied. He then pled nolo contendere, reserving the right to appeal the denial of his motion to suppress. This appeal concerns the legality of the search.

Appellant worked for ABA Industries. The company's security officer advised the sheriff's office that appellant was dealing in narcotics in the company parking lot early in the morning and during the lunch hour. Detective Howard Reed ran a background check on appellant and learned that he had been charged with possession of marijuana in the past. Detective Reed established a surveillance of the parking lot, beginning on June 14, 1983. He watched appellant for two days

and observed nothing suspicious. On both days, however, appellant left the plant in his automobile for about a half hour during his lunch period. On June 16, 1983, at about noon, detective Reed followed appellant in his automobile to a building known as Martin Manufacturing. Approximately six minutes after appellant went inside the building, an unidentified man came out briefly and looked up and down the street in what described as a "suspicious manner." About six minutes later, appellant came out of the building carrying a paper bag, immediately followed by the same unidentified man. As appellant left in his automobile, the man once again looked up and down the street before returning inside.

Detective Reed, an experienced narcotics officer, described the paper bag as being rolled down from the top onto the

contents. The bag was rolled so tightly that Reed could distinguish the shape of the contents inside, that it was "something of a loose nature, because it had a round shape to it." He further explained that during his undercover work he had observed persons break up quantities of marijuana and package it for transportation using brown paper bags. Such persons "always seemed to carry" the bags in the manner of appellant. Predicated upon appellant's actions and the appearance of the bag, Detective Reed believed that the bag contained marijuana.

When appellant returned to ABA Industries, he left the bag in his automobile and went back to work. Detective Reed continued to maintain surveillance because he anticipated that a narcotics transaction was likely to ensue. however, nothing occurred. Appellant

left work at 5:00 p.m., entered his car, and drove out of the parking lot. At this point, Detective Reed stopped the automobile and removed appellant from the car. Detective Reed was unable to see the bag in plain view. Without obtaining appellant's consent to search, Detective Reed entered the car and located the bag in a compartment. Upon opening the bag, he found a half pound of marijuana.

Appellant first argues that Detective Reed did not have probable cause to believe that the brown bag contained marijuana. We cannot accept this proposition. In P.L.R. v. State, No. 64, 264 (Fla. July 19, 1984), our supreme court recently upheld the seizure of a manila envelope containing marijuana at a known drug transaction site predicated upon the testimony of an experienced narcotics officer. He stated that the

only use he had ever seen for this type of envelope at the location was for narcotics transaction. Here, Detective Reed, also a trained narcotics officer, was able to rely not only upon his experience with folded-down brown paper bags, but also upon appellant's suspicious activities which preceded the confrontation. Thus, Detective Reed had probable cause to seize the bag. Cf. Thompson v. State, 405 So.2d 501 (Fla. 2d DCA 1981) (police officer's testimony that marijuana is usually carried in brown manila envelopes insufficient, by itself, to sustain seizure of a brown manila envelope).

Appellant's second point has more merit. He argues that even assuming that Detective Reed had probable cause to believe the bag contained marijuana, he was obligated to obtain a search warrant before opening the bag. The state justifies the warrantless search upon the

doctrine of exigent circumstances surrounding automobile searches. The point is subtle, but a careful reading of recent United States Supreme Court cases on the subject leads us to conclude that the appellant's position is correct.

In Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), the police had probable cause to believe that a suitcase containing marijuana would arrive by airplane at the Little Rock airport. The police watched as the suitcase was unloaded, placed into a taxi and driven away. The police stopped the taxi and retrieved the unlocked suitcase from the trunk. Upon opening it, they found marijuana. In quashing the warrantless search, the Court said:

> The only question, therefore, is whether the police, rather than immediately searching the suitcase without a warrant, should have taken it, along with respondent, to the police station and there obtained a

> warrant for the search. A lawful search of luggage generally may be performed only pursuant to a warrant. In Chadwick, we declined an invitation to extend the Carroll exception to all searches of luggage, noting that neither of the two policies supporting warrantless searches of automobiles applies to luggage. Here, as in Chadwick, the officers had seized the luggage and had it exclusively within their control at the time of the search. Consequently, "there was not the slightest danger that [the luggage] or its contents could have been removed before a valid search warrant could be obtained." 433 U.S., at 13, 53 L.Ed.2d 538, 97 S.Ct. 2476

442 U.S. at 762, 99 S.Ct. at 2592, 61 L.Ed.2d at 243-44. In rejecting the contention that the "automobile exception" eliminated the requirement of obtaining a search warrant, the Court observed that a suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations.

Only three years later, however, the United States Supreme Court in United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), upheld the warrantless search of a closed brown paper bag found in the trunk of an automobile that the police had probable cause to believe was transporting contraband. The Court ruled that if the police have probable cause to believe that a vehicle is carrying contraband, they may search it in its entirety and in the course of the search may open any containers found therein. The Court recognized that it was receding from some of the rationale of Arkansas v. Sanders but adhered to its holding in that case.

The First District Court of Appeal in Mancini v. State, 448 So.2d 573 (Fla. 1st DCA 1984), had occasion to analyze Sanders and Ross with respect to facts much like

those in the instant case. There, the police had obtained a warrant to search the defendant's apartment for cocaine. They also had probable cause to believe that the defendant was going to receive a package of cocaine from a Federal Express office at a specified time. Officers established a surveillance of the defendant who was observed obtaining a Federal Express package, placing it in his automobile, and driving away. The police had assumed that the defendant would proceed to his apartment, thereby enabling them to seize the package in connection with the execution of the search warrant. However, after the defendant continued to drive around town, the police stopped the automobile, seized the package, and opened it without consent. In holding the search invalid because of the absence of a warrant, the court said:

With respect to the cocaine found in the Federal Express package, the state urges that United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), is supportive of the trial court's denial of the defendant's motion. The state's reliance on Ross, however, is misplaced. Although the officers clearly had probable cause to believe that the defendant was in the process of transporting cocaine in his automobile at the time the officers stopped him, it is equally clear that the probable cause was limited to the Federal Express package as contrasted with the automobile generally. Under these circumstances, the Supreme Court has interpreted the Fourth Amendment as requiring the officers to obtain a search warrant authorizing the opening and searching of the container. Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979); United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). In Ross the court held that police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere therein may conduct a warrantless search of the vehicle and may open any containers which may contain the contraband. Significantly, however, the court was careful to point out the distinction between the situation where, as in Ross, the probable cause information was that the contraband was somewhere within the automobile and the situation, as in Sanders, where the probable cause was limited to a

container within the automobile. In discussing its previous opinion in Sanders, the court in Ross stated:

> The Arkansas Supreme Court ruled that the warrantless search of the suitcase was impermissible under the Fourth Amendment and this Court affirmed. As in Chadwick, the mere fact that the suitcase had been placed in the trunk of the vehicle did not render the automobile exception of Carrol [v. United States, 267 U.S. 132, 45 S.Ct 280, 69 L.Ed. 543 (1925)] applicable; . . .
> * * * * *
> As the Chief Justice noted in his opinion [in Sanders] concurring in the judgment:
>
> > "Because the police officers had probable cause to believe that respondent's green suitcase contained marijuana before it was placed in the trunk of the taxicab, their duty to obtain a search warrant before opening it is clear under United States v. Chadwick, 433 U.S. 1, 53 L.Ed.2d 538, 97 S.Ct. 2476 (1977) . . .
> >
> > "...Here, as in Chadwick, it was the luggage being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband. The relationship between the automobile and the contraband was purely coincidental, as in Chadwick. The fact that the suitcase was

> resting in the trunk of the automobile at the time of respondent's arrest does not turn this into an "automobile' exception case. The Court need say no more." 442 U.S., at 766-767, 61 L.Ed.2d 235, 99 S.Ct. 2586 [at 2594].

456 U.S. at 812, 813, 102 S.Ct. at 2166. Nor has the Supreme Court left any room for a material distinction being made between the kind of container involved in the case at bar and those which were "protected" under the court's rulings in Chadwick and Sanders. Id. at 814, r. 19, Presumably, that is why the state has not urged upon us any such purported distinction.

> Under the above authorities, the defendant was entitled to an order granting his motion to suppress directed to the contraband found in the Federal Express package . . . .

448 So.2d at 575, 576 (footnotes omitted).

Our sister court's interpretation of Sanders and Ross appears to be correct. Ross seems to draw the distinction between a case where the police have probable cause to believe that contraband is located in a specific container within a

vehicle and one in which they simply have probable cause to believe that a vehicle is transporting contraband. Carried to its extreme, this reasoning would produce the anomaly that the police are at liberty to conduct a warrantless search of a vehicle which they have probable cause to believe is transporting contraband only so long as they do not know the exact container in which the contraband is located. Perhaps, however, the holding in Sanders and Mancini can be grounded upon the narrow proposition that, as in the instant case, the police had the container under surveillance before it reached the vehicle, and the fact that later it was fortuitously placed in the vehicle before being seized does not authorize the application of the "automobile exception."

Therefore, with some reluctance, we

hold that while Detective Reed properly seized the brown paper bag, he should have detained appellant and obtained a warrant before searching it. Accordingly, we reverse appellant's conviction.

BOARDMAN, A.C.J., and SCHOONOVER, J., Concur.

(2)

Office-Supreme Court, U.S.
FILED
MAY 8 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1651

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF FLORIDA,

Petitioner,

vs.

HENRY MARCY MANEE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FLORIDA SECOND DISTRICT COURT OF APPEAL

DAVID J. KURLAND
Kurland & Johnson, P. A.
308 South Garden Avenue
Clearwater, Florida 33516
(813) 461-3555
Attorney for Respondent

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS. i

TABLE OF CITATIONS ii

SUMMARY OF ARGUMENT. 1

REASONS FOR OPPOSITION TO WRIT 2

CONCLUSION 8

CERTIFICATE OF SERVICE 9

JOINT APPENDIX TO PETITION FOR WRIT. . A1-16

TABLE OF CITATIONS

	PAGES
Arkansas v. Sanders, 442 U.S. 753 (1979)	3, 5
Carroll v. United States, 267 U.S. 132 (1925)	2, 5
Florida v. Manee, 457 So.2d 530 (Fla. 2d DCA 1984), cert. denied, ___ So.2d ___ (Fla. Case No. 66,210, Feb. 20, 1985)	2, 4, 7
Mancini v. State, 448 So.2d 573 (Fla. 1st DCA 1984)	7
Oklahoma v. Castleberry, ___ U.S. ____ (Case No. 83-2126) 53 LW 4450 (April 1, 1985)	1, 7
United States v. Chadwick, 433 U.S. 1 (1977)	3, 5, 6
United States v. Ross, 456 U.S. 798 (1982)	1, 2, 3, 5, 7

SUMMARY OF ARGUMENT

Petitioner presents a question which this Court has answered in United States v. Ross, 456 U.S. 798 (1982) and has affirmed in Oklahoma v. Castleberry, ___ U.S. ____ (Case No. 83-2126), 53 LW 4450 (April 1, 1985).

Where probable cause to search is limited to a movable container found within an automobile, as contrasted with probable cause to search an automobile generally, this Court has interpreted the Fourth Amendment as requiring a police officer to obtain a search warrant authorizing the opening and searching of the container.

In the case at Bar, probable cause to search focused upon a brown paper bag which the police officer observed Respondent place within his automobile. The Florida Second District Court of Appeal rendered its opinion faithful to the principles of law settled by this Court in Ross, and affirmed in Castleberry.

REASONS FOR OPPOSITION TO WRIT

The Florida Second District Court of Appeal has not decided an important question of Federal law which has not been settled by this Court. It has, in the Manee decision, merely analyzed the facts of the case before it, using the precedents established by this Court. Florida v. Manee, 457 So.2d 530 (Fla. 2d DCA 1984), cert. denied, ___ So.2d ___ (Fla. Case No. 66,210, Feb. 20, 1985).

This Court has clearly delineated between two classes of cases:

(1) If the officer has probable cause to believe there is contraband somewhere in the car, but he does not know exactly where, he may search the entire car, as well as any containers found therein, without the necessity of procuring a search warrant. United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); Carroll v. United States, 267 U.S. 132, 45 S.Ct.

280, 69 L.Ed 543 (1925).

(2) If the officer only has probable cause to believe there is contraband in a specific container in the car, he must detain the container and delay his search until a search warrant is obtained. United States v. Ross, supra; Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed2d 235 (1979); United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed2d 538 (1977).

The Florida Second District Court of Appeal has ruled that the Sanders and Chadwick class of cases control the following facts in the case at Bar:

> Detective Reed established a surveillance of the parking lot, beginning on June 14, 1983. He watched Respondent for two days and observed nothing suspicious. On both days, however, Respondent left the plant in his automobile for about one-half (½) hour during his lunch period. On June 16, 1983, at about noon, Detective Reed followed Respondent in his automobile to a building known as Martin Manufacturing.

Approximately six minutes after Respondent went inside the building, an unidentified man came out briefly and looked up and down the street in what Reed described as a "suspicious manner." About six minutes later, Respondent came out of the building carrying a paper bag, immediately followed by the same unidentified man. As Respondent left in his automobile, the man, once again, looked up and down the street before returning inside. . . . Predicated upon Respondent's actions and the appearance of the bag, Detective Reed believed that the bag contained marijuana.

When Respondent returned to ABA Industries, he left the bag in his automobile and went back to work. Detective Reed continued to maintain surveillance because he anticipated that a narcotics transaction was likely to ensue. However, nothing occurred. Respondent left work at 5:00 P. M., entered his car, and drove out of the parking lot. At this point Detective Reed stopped the automobile and removed Respondent from the car. . . . Without obtaining Respondent's consent to search, Detective Reed entered the car and located the bag in a compartment. State of Florida v. Manee, 457 So.2d 530 (Fla. 2d DCA 1984). (JA 3-6).

Support for Petitioner's assertion that

the Florida Second District Court of Appeal decided a substantial and unsettled Federal question arising under the Constitution is not apparent from a reading of United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed2d 572 (1982). In discussing its Opinion in Sanders, supra, this Court, in Ross, stated:

> The Arkansas Supreme Court ruled that the warrantless search of the suitcase was impermissible under the Fourth Amendment and this Court affirmed. As in Chadwick, the mere fact that the suitcase had been placed in the trunk of the vehicle did not render the automobile exception of Carroll applicable; . . . As the Chief Justice noted in his Opinion concurring in the Judgment:
>
> > "Because the police officers had probable cause to believe that Respondent's green suitcase contained marihuana before it was placed in the trunk of the taxicab, their duty to obtain a search warrant before opening it is clear under United

> States v. Chadwick, 433 U.S. 1, 53 L.Ed2d 538, 97 S.Ct. 2476 (1977). . .
>
> ". . . Here, as in Chadwick, it was the luggage being transported by Respondent at the time of the arrest, not the automobile in which it was carried, that was the suspected locus of the contraband. The relationship between the automobile and the contraband was purely coincidental, as in Chadwick. The fact that the suitcase was resting in the trunk of the automobile at the time of Respondent's arrest does not turn this into an automobile exception case. The Court need say no more." 442 U.S., at 766-767, 61 L.Ed2d 235, 99 S.Ct. 2586.

This distinction between the class of case where there is probable cause to search the entire automobile, as opposed to the class of case where there is probable cause to search only a movable container found within an automobile, is clearly drawn in

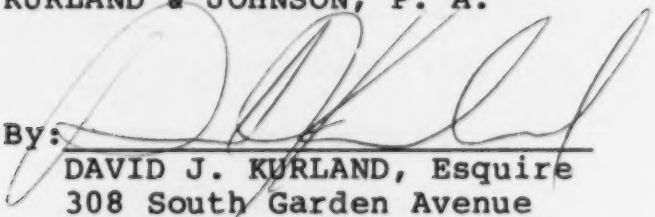
Ross, and has been recently affirmed by this Court in Oklahoma v. Castleberry, ___ U.S. ____, (Case No. 83-2126), 53 LW 4450 (April 1, 1985). Neither has this distinction gone unrecognized by the Florida Courts of Appeal that have followed the teachings of Ross, in Mancini v. State, 448 So.2d 573 (Fla. 1st DCA 1984) and State v. Manee, 457 So.2d 530 (Fla. 2d DCA 1984), cert. denied, ___ So.2d ___ (Fla. Case No. 66,210, Feb. 20, 1985).

CONCLUSION

Certiorari should be denied and the decision of the Second District Court of Appeal affirmed.

Respectfully submitted,

KURLAND & JOHNSON, P. A.



By: _____

DAVID J. KURLAND, Esquire
308 South Garden Avenue
Clearwater, Florida 33516
(813) 461-3555
Attorney for Respondent

CERTIFICATE OF SERVICE

I, DAVID J. KURLAND, Counsel for the Respondent, and a member of the Bar of the United States Supreme Court, hereby certify that on the 7th day of May, 1985, I served three copies of the Brief in Opposition to Petition for Writ of Certiorari upon DAVIS G. ANDERSON, JR., Esq., and FRANK J. MIGLIORE, JR., Esq., Assistant Attorneys General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602, by a duly addressed envelope with postage prepaid.

DAVID J. KURLAND, Esquire
Attorney for Respondent